

SERVICE DATE – NOVEMBER 26, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42104

ENTERGY ARKANSAS, INC. & ENTERGY SERVICES, INC.

v.

UNION PACIFIC RAILROAD COMPANY,
MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC., &
BNSF RAILWAY COMPANY

Decided: November 19, 2012

Digest:¹ In this decision, we are denying a petition for reconsideration of the Board's March 15, 2011 decision in the NOR 42104 docket as the petitioner has either failed to identify errors or, in the case of the Board's movement specific adjustments to its railroad costing model, not identified an error of sufficient materiality that it would convince us to alter the March 2011 Decision.

BACKGROUND

In a decision served on March 15, 2011 (March 2011 Decision), the Board found that the Independence Steam Electric Station (ISES), a Newark, Arkansas, coal-fired electric utility plant co-owned by Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Services, Inc., and Arkansas Electric Cooperative Corporation (AECC), had a statutory right to coal transport service by BNSF Railway Company (BNSF) and Missouri & Northern Arkansas Railroad Co., Inc. (MNA) from the northern Powder River Basin (PRB) mines and could thus obtain a transportation alternative to the service currently provided by Union Pacific Railroad Co. (UP) and MNA from the southern PRB mines.² The Board also considered the complainants' separate request that the Board prescribe a through route for service by BNSF, at an interchange with MNA, for coal transport from the southern PRB mines. The Board ultimately denied that second request because the complainants had neither established that the service problems ISES experienced were due to anticompetitive conduct nor demonstrated that the proposed BNSF/MNA through

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² March 2011 Decision at 6-7.

route to the southern PRB mines was better or more efficient than the current UP/MNA route.³ The March 2011 Decision became effective on the date of service.

On April 4, 2011, AECC filed a petition for reconsideration, asking the Board to revisit and reopen the Docket No. NOR 42104 portion of the March 2011 Decision. In its reconsideration petition, AECC contends that the Board materially erred by: (1) failing to either consider or properly credit certain AECC evidence; (2) describing one standard for relief in its June 26, 2009 decision (June 2009 Decision⁴), but then applying another standard in its March 2011 Decision that AECC contends is “contrary to the statute and regulations”; and (3) failing “to protect MNA from adverse actions by UP that are likely to remove MNA as a prospective competitor in the future.”⁵ AECC specifically takes issue with the Board’s use of the Uniform Railroad Costing System (URCS) to assign costs to the routes, the comparison of routing terrain, and the conclusion that the parties agreed on the need for “significant upgrades” of the proposed route’s physical plant and interchange facilities.⁶

UP and MNA argue, in their April 25, 2011 replies, that the petition should be denied because AECC has not identified any material error in the Board’s March 2011 Decision. UP contends that the findings the Board made regarding adjustments to URCS were consistent with standing Board policy and that AECC mischaracterizes the record regarding the topographical inferiority of the proposed BNSF/MNA route. UP also argues that the Board’s June 2009 Decision and March 2011 Decision are consistent with each other and the applicable legal standards.⁷ MNA contends that the Board did not ignore AECC’s evidence in light of references it made to the “totality of the evidence” and the record of evidence supplied by all of the complainants.⁸

PRELIMINARY MATTER

On June 29, 2011, AECC filed a motion for leave to file a supplement in support of its petition for reconsideration. In its motion, AECC claims that a statement filed by UP in another docket demonstrated that “during the service disruption that began in 2005 UP actually increased

³ Id. at 11, 13-14. The Board was also unable to reach a majority decision on the complainants’ request that agency approval of the UP-MNA lease be partially revoked. Id. at 17. That request was considered in a docket – Docket No. FD 32187 – that was not included in the pending reconsideration petition.

⁴ Entergy Arkansas, Inc. v. Union Pac. R.R., NOR 42104 et al. (STB served June 26, 2009).

⁵ AECC Petition for Reconsideration (AECC Petition) at ii. It should be noted that UP has a contractual right to replace MNA and work directly with BNSF to provide ISES service from the northern PRB mines. March 2011 Decision at 6 n.11.

⁶ AECC Petition at 3-8.

⁷ UP Reply to AECC Petition at 3-5, 10-14.

⁸ MNA Reply to AECC Petition at 4-5.

its shipments of southern PRB coal to other customers, while the Independence plant suffered a huge shortfall.”⁹ AECC alleges that this UP statement is new evidence that demonstrates: (1) “there was no widespread inability on [UP’s] part to deliver established volume levels to existing customers”; (2) “the Board was misled in thinking that the scope of the service failure experienced by Independence ‘affected the shipping public generally’”; and (3) “the service disruption that Independence suffered in 2005 and 2006 was the result of competitive abuse – even under the restrictive definition of that term the Board used in this case.”¹⁰

On July 19, 2011, UP filed its reply opposing the AECC motion to supplement. UP argues that AECC’s motion should be denied as its newly discovered information could have been obtained long before the Board issued its March 2011 Decision.¹¹ In support of its opposition, UP alleges that AECC could have obtained this newly discovered information from the following sources: (1) annual UP reports released to the public in 2005 and 2006; (2) a press release and magazine article published in 2007; (3) a 2008 pleading that was filed twice in this proceeding; (4) this proceeding’s discovery period; and (5) the National Coal Transportation Association website, to which AECC has access as a member.¹²

We will deny AECC’s motion to file a supplement to its petition for reconsideration, because the newly discovered evidence AECC has identified in its motion does not meet our standard for new evidence: “[i]t is axiomatic that ... new evidence must in fact be new; it is not new if the ‘same substance’ could have been brought before us previously.” Tongue River R.R.—Construction and Operation—W. Alignment, FD 30186 (Sub-No. 3), slip op. at 13 (STB served June 15, 2011) (citing Friends of Sierra R.R. v. ICC, 881 F.2d 663, 667 (9th Cir. 1989)). While the UP statement filed in another docket was made public after the Board decision in this matter, we have determined that the service data contained in that statement were available to AECC long before the Board’s March 2011 Decision. For example, the fact that UP increased coal shipments to other customers during the timeframe at issue is plainly evident from UP’s 2005 Annual Report, which was publicly available as of March 2006. Accordingly, the UP statement is not “new evidence” for reconsideration purposes.

DISCUSSION AND CONCLUSIONS

We may grant a petition to reconsider a decision, and reopen the related proceeding, if the petitioner demonstrates material error, new evidence, or substantially changed circumstances

⁹ AECC Motion for Leave to File Supplement in Support of its Petition for Reconsideration Based on Newly-Discovered Evidence (AECC Motion) at 2.

¹⁰ AECC Motion at 3, 5.

¹¹ UP Reply to AECC Motion at 2-3.

¹² UP Reply to AECC Motion at 2-4. Although UP also cites a Wikipedia page regarding the PRB (http://en.wikipedia.org/wiki/Powder_River_Basin), that page is subject to changes initiated by the public and has been edited since the March 2011 Decision.

that would materially affect the case.¹³ The alleged grounds for reopening must be sufficiently material that, if accepted, they would convince us to alter the decision in this matter.¹⁴ AECC alleges that the Board committed several material errors in its March 2011 Decision.

AECC has failed to meet its burden for reconsideration and reopening. Many of the errors AECC attributes to the Board are based on what AECC views as omissions in the March 2011 Decision's description of the most probative and persuasive evidence – the evidence presented by Entergy and UP – in what is a voluminous and complex record. The Board considered AECC's evidence, but it did not explicitly address every piece, as it was duplicative of evidence submitted by Entergy. However, to the extent AECC claims material error for ignoring its evidence, we address those arguments below. The remainder of AECC's objections depends upon erroneous interpretations of Board precedent and policy. Neither AECC's evidentiary allegations nor its interpretation of pertinent law constitute the material error required for AECC to adequately support its petition for reconsideration. AECC's specific claims are addressed below.

A. Standard for Relief on the Merits

AECC argues at length that the Board applied the wrong legal standard in the March 2011 decision¹⁵ and that, instead, the Board should have followed what AECC characterizes as a different legal standard described in the June 2009 Decision.¹⁶ When we compare the two decisions in the context of our statutory and regulatory framework, however, there is no material discrepancy between the legal standard described in the June 2009 Decision and the legal standard the Board subsequently followed in the March 2011 Decision.

We have concluded that AECC failed to demonstrate material error in the Board's standard of relief because: (1) the March 2011 Decision is consistent with the June 2009 Decision; (2) the June 2009 Decision deferred on the specifics of its approach to the merits until after the evidence was presented, thereby establishing the later decision as controlling; and (3) neither of the decisions in this matter establishes that mere proof of inadequate service or the

¹³ 49 U.S.C. § 722(c); 49 C.F.R. § 1115.3; see also CSX Corp., et al., – Control – Conrail, Inc., et al., 3 S.T.B. 764, 770 (1998).

¹⁴ E.g., Montezuma Grain v. STB, 339 F.3d 535, 542 (7th Cir. 2003).

¹⁵ Some of AECC's arguments are premised on misconceptions of the Board's findings in the March 2011 Decision. AECC states that "The Board's findings establish that the through route is more efficient than the UP/MNA route" AECC Petition at 14. That is the opposite of what the Board found in the March 2011 Decision. AECC also asserts that this is the first case where relief was denied "because the anticompetitive conduct of the incumbent wasn't 'abusive' enough." Id. at 15. The Board's decision made no such finding, but rather found anticompetitive conduct had not been demonstrated.

¹⁶ Id. at 12-17.

existence of service alternatives merits a through route prescription.¹⁷ We discuss each of these points more fully below.

There is no conflict between the descriptions of the legal standard offered in the June 2009 Decision and the legal standard the Board subsequently followed. AECC argues that the Board – in its March 2011 Decision – either misinterpreted or entirely ignored its June 2009 Decision regarding the standards applicable to through route prescriptions. However, the standard described in the June 2009 Decision is consistent with the standard the Board applied in its March 2011 Decision.¹⁸

In its June 2009 Decision (at 7), the Board explained that a through route would be prescribed in this proceeding if the complainants show “the bottleneck railroad has exploited its market power by (1) providing inadequate service over its lines or (2) foreclosing more efficient service over another carrier’s line . . . [I]f Entergy or AECC can demonstrate that, due to this interchange commitment, UP and MNA are providing inadequate service or foreclosing more efficient service over another carrier, we may direct that a new route be opened and order MNA to establish a common carrier rate for interchange with that other carrier.”¹⁹ The June 2009 Decision (at 8) also specified that the Board would consider all relevant factors including those listed in 49 C.F.R. § 1144.2(a)(1).

Thus, the Board’s June 2009 Decision, while setting the parameters for relief, referred directly to §1144(2)(a) as well as to language from CP&L. In the March 2011 Decision, the Board again stated that, in order to obtain relief under our competitive access rules, the complainants must meet the relevant statutory requirements of 49 USC § 10705, as well as the requirements set forth in 49 C.F.R. § 1144.2(a). The Board further observed that “some Board precedent suggests” that a party could obtain a prescription under an arguably more relaxed standard than those stated in §1144.2(a), i.e., that the alternative route is “better” or “more efficient.”²⁰

¹⁷ AECC takes issue with the March 2011 Decision description of Central Power & Light Co. v. Southern Pacific Transportation Co., 1 S.T.B. 1059 (1996) (CP&L). AECC Petition at 13. However, AECC’s disagreement with the Board over the proper interpretation of the Board’s own regulations and precedent does not demonstrate material error.

¹⁸ As noted above, this case was evaluated using the standards set forth at 49 U.S.C. §10705. The Board’s regulation at 49 C.F.R. § 1144.2(a)(1), implementing §10705 for competitive access situations such as that presented here, states that the Board shall prescribe a through route where the prescription “is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. § 10101 or is otherwise anticompetitive, and otherwise satisfies the criteria of 49 U.S.C. 10705 and 11102, as appropriate.”

¹⁹ June 2009 Decision at 7.

²⁰ March 2011 Decision at 7-8, where the Board recognized the tension between these competitive access standards. As a result of its broad inquiry into competitive access issues in Ex Parte 705, Competition in the Railroad Industry, the Board has instituted a proceeding related to competitive access and has sought studies and comments regarding a reciprocal switching
(continued . . .)

The Board therefore began its analysis in the March 2011 Decision by scrutinizing the record to determine if, due to this interchange commitment, UP and MNA engaged in anticompetitive conduct, thus providing ISES with inadequate service.²¹ The Board also scrutinized the record to determine whether the defendants exploited their market power to foreclose the use of a “better” or “more efficient” alternative.²² These inquiries are plainly implicated by the Board’s express intent in its June 2009 Decision to engage in a “fact-specific” inquiry to make determinations of “first impression,” invoking the regulation the Board directly cited in both decisions. AECC has thus failed to identify language in the June 2009 Decision that establishes that these aspects of the analytical approach the Board used in its March 2011 Decision were erroneous.

AECC also takes issue with the March 2011 Decision’s characterization of CP&L, originally cited in the June 2009 Decision quotation set forth above. AECC disputes the Board’s exact phrasing that CP&L “suggested” a less rigorous legal standard that might be seen to conflict with the standard stated in 49 C.F.R. § 1144. AECC maintains that CP&L was no mere “suggestion,” but instead an authoritative interpretation of these regulations.²³ But the Board’s March 2011 Decision did not disregard the language cited by AECC from CP&L, and cited in the June 2009 Decision, but rather explicitly applied the CP&L criteria, as well. The Board then found that, based on the evidence before it, AECC and Entergy had failed to meet either standard.

We also disagree with AECC’s argument that “the Board ruled in its 2009 Decision that, under its competitive access rules, inadequate service is a ground for prescribing a through route and does not require a showing that the bad service is a result of ‘competitive abuse.’”²⁴ This interpretation is directly contradicted by the June 2009 Decision language cited by AECC: “[I]f Entergy or AECC can demonstrate that, due to this interchange commitment, UP and MNA are providing inadequate service or foreclosing more efficient service over another carrier, [the Board] may direct that a new route be opened”²⁵ AECC and Entergy therefore at minimum needed to link the interchange commitment to inadequate service, which, as was discussed in the March 2011 Decision, they failed to do.

(. . . continued)

proposal. See Ex Parte 711, Petition for Rulemaking to Adopt Revised Competitive Switching Rules.

²¹ Id. at 11 (analyzing the “vast majority of evidence . . . directed at the question of whether UP/MNA has engaged in anticompetitive conduct by foreclosing the use of a ‘better’ alternative BNSF/MNA route”).

²² Id. at 11–14.

²³ AECC Petition at 13

²⁴ Id. at 9.

²⁵ AECC Petition at 12 (emphasis added).

In sum, AECC has failed to identify material error in either the reasoning underlying, or the implementation of, the Board's CP&L and §1144.2 standards for reviewing the Entergy-AECC through route prescription request. We therefore turn to AECC's arguments that the Board committed material error in the application of those legal standards.

B. UP Service Inadequacies

AECC seeks reconsideration of the Board's conclusion that the service inadequacies it experienced in the past did not support the prescription of an alternative through route from the southern PRB mines. AECC argues that the Board erred by ignoring evidence "that the poor service [experienced at ISES] and anticompetitive conduct are closely linked."²⁶ According to AECC, "competitive harm is manifest in the response of the carrier to the disruption of service, whether or not market power caused the disruption."²⁷ AECC alleges that "UP captive customers ... were subjected to a protracted service and operational disruption" and that "[t]he contrast between the experience of [ISES] and the market as a whole summarizes succinctly the entire service issue."²⁸

In its March 2011 Decision, the Board noted that the three alleged service disruptions (with the earliest disruption dating back more than 15 years before these proceedings were initiated) were attributable to natural disasters and significant line disruptions.²⁹ The Board observed that there was no evidence in the record that UP's service inadequacies were specific to ISES, or that BNSF would not have similarly provided adversely affected service to the facility.³⁰ The Board also found that evidence regarding UP's service response during the 1997 period (e.g., the acquisition of additional cars and rerouting empty cars to address service inadequacies) contradicted the complainants' allegations of competitive abuse.³¹ The Board found that the record bearing on the complainants' allegations that UP refused to allow MNA and BNSF to establish a through route that could lessen service issues during the 1997 disruption did not provide sufficient support for the complainants' claims.³²

²⁶ AECC Petition at 9.

²⁷ Id. at 9-10 (emphasis in original).

²⁸ Id. at 11.

²⁹ March 2011 Decision at 8-9.

³⁰ E.g., id. at 9 ("UP's service problems during the 1993 and 2005 periods were not specific to Entergy and also affected BNSF"). The Board also cited UP evidence that "its service level during the 2005 period was comparable to BNSF's, based on: (1) a comparison of UP's cycle time data to BNSF's; and (2) a comparison of actual volumes moved with the volumes that the mines were prepared to load in UP and BNSF trains." Id. (citing UP Reply Evidence and Argument (filed June 4, 2010) at 41-42 and V.S. Gough, Attachment 1 (prior testimony) at 6).

³¹ March 2011 Decision at 10.

³² Id.

An examination of the standard and the evidence presented establishes that AECC has failed to identify material error in this portion of the Board's March 2011 Decision. Both the June 2009 and March 2011 Decisions establish that "[t]he Board may exercise its authority under section 10705 to order a carrier to open another route if a party demonstrates that the bottleneck railroad has exploited its market power by [either] providing inadequate service over its lines or ... foreclosing more efficient service over another carrier's line."³³ None of the evidence presented by AECC established the required UP exercise of market power – anticompetitive conduct or abuse – against ISES.³⁴

C. Route Curvature

AECC also claims that the Board's conclusions regarding the greater curvature of the BNSF/MNA route were erroneous because "AECC's evidence showed that [the] claims regarding curvature were unfounded." AECC contends that "[t]he measurement of curvature used by UP did not distinguish between shallow curves [and] sharp ones, and UP offered no evidence linking the measured curvature to any specific magnitude of cost." AECC also argues that UP failed to introduce evidence addressing "gentle" river downgrades, the speed at which the curves were actually traversed, or the availability of track lubrication devices.³⁵

In the March 2011 Decision, the Board cited UP's expert narrative describing its Rail Traffic Controller (RTC) modeling³⁶ as support for the conclusion that curvature favored the current UP/MNA route.³⁷ The UP RTC model data underlying that cited narrative tell a compelling story of topography and logistics that clearly favored the current UP/MNA route³⁸:

³³ June 2009 Decision at 7; March 2011 Decision at 7-8.

³⁴ AECC instead argued for an alternative reading of the Board's prescription authority, stating through its expert: "Neither the language of the statute nor its underlying economic rationale requires that the service problems somehow originate from the market power held by the railroad over a specific facility or movement." AECC Rebuttal Evidence and Argument (filed Jul. 9, 2010), V.S. Nelson at 7. However, in that same expert statement, AECC conceded that it was presenting evidence of problems likely experienced by other UP-served shippers, regardless of UP's market power in any particular setting: "No one has alleged that the Midwest floods, UP's merger integration problems, or the Joint Line throughput problems were caused by UP's market power over the ISES coal movement, or that service problems were not experienced by other shippers." Id. at 7-8 (emphasis added).

³⁵ AECC Petition at 7-9.

³⁶ A long-accepted model for demonstrating operational characteristics of railroad line routing. See, e.g., XCEL Energy v. BNSF Ry., 7 S.T.B. 589, 613-14 (2004).

³⁷ March 2011 Decision at 12 n.34 (citing UP Reply Evidence and Argument (filed June 7, 2010), V.S. Hughes at 5).

³⁸ The Board has placed the UP RTC model data in tables for the purposes of this decision. UP presented the data to the Board in an electronic format, which Board staff examined via a run of its own RTC model software.

Route Sorted By Time (hours)			
Route	Loads	Empties	Total
UP – MNA (Current)	32.4	28.5	60.9
BNSF-MNA via Lamar	34.6	29.6	64.2
BNSF-MNA via Aurora	35.6	30.3	65.9

Route Sorted by Fuel (gallons)			
Route	Loads	Empties	Total
UP – MNA (Current)	12,910	10,623	23,533
BNSF-MNA via Lamar	13,506	11,267	24,773
BNSF-MNA via Aurora	14,034	11,540	25,574

Route Sorted by Curvature (degrees of Central Angle)			
Route	Loads	Empties	Total
UP – MNA (Current)	17,585	31,064	48,649
BNSF-MNA via Lamar	34,271	34,258	68,529
BNSF-MNA via Aurora	35,956	35,930	71,886

The UP RTC route times, fuel usage, and curvature numbers all lend direct and clear support to the Board’s conclusion that the topography of the proposed BNSF/MNA route would have marked efficiency impacts that would favor the UP/MNA route.

On the other hand, neither Entergy Arkansas nor AECC submitted RTC data in their opening evidence to prove the operational details that AECC now claims are vital weaknesses in UP’s data. Entergy instead submitted RTC data on rebuttal that proposed four different RTC scenarios, but failed to rebut the UP RTC data by identifying supportable claims of error in the UP RTC model.³⁹ AECC introduced no data – RTC or otherwise – to support its expert’s

³⁹ Although UP described the RTC analysis as “ideal” or “unopposed” and embraced the RTC assumption of a train operating at the maximum possible speed given available locomotive power, grades, curves, car types, and trailing tons, RTC inputs (e.g., rail weight, fuel) do allow modelers to adjust the model to the real world. The UP RTC model did not account for delays from train meets, train passes, maintenance, construction, weather, crew availability, and mechanical issues. However, both the carriers and the shippers’ cases should have benefitted from this idealized presentation. Yet it was the UP/MNA Route that appeared markedly superior under the RTC model. While Entergy described transit times in an effort to rebut suggestions that the BNSF/MNA Route’s curvature would have a negative efficiency impact, Entergy did not actually submit supporting data. Thus, Entergy and AECC did not persuasively present the “real-world” information that allegedly rebutted the UP RTC model results.

assertions regarding gentle downgrades, the speed at which the curves were traversed, or track lubrication devices.⁴⁰

D. “Significant” Upgrades

AECC takes issue with the Board’s conclusion that “[t]he parties all agree that significant [capital] upgrades are needed [to haul loaded trains over the BNSF/MNA Route] but disagree on the cost of those upgrades.”⁴¹ AECC claims that it “presented evidence that the MNA does not need significant upgrades to handle the volume of coal traffic that would initially be available to this route, and that higher volumes of traffic that might become available in later years would provide revenue to support any capital improvements”⁴² AECC alleges that the Board simply ignored this evidence.

AECC has not identified a material error. When the Board referred to “significant capital upgrades” in the March 2011 Decision, it was including the interchange facilities the parties agreed⁴³ would be needed for the proposed BNSF/MNA route to become a reality. The disagreement between the parties regarding interchange facilities centered on the ultimate costs rather than whether costs would be incurred.⁴⁴ Thus, the apparent disagreement between the

⁴⁰ UP’s data-supported expert narrative and the complainants’ failure to rebut that narrative and data ultimately led the Board to state that “there is no dispute that the terrain of the alternative BNSF/MNA route is inferior to that of the current route, which (for example) has less severe curvature that would permit greater train speeds, reduce the number of locomotives needed, improve fuel consumption, reduce the wear and tear on the track and rolling stock, and takes advantage of a higher density line.” March 2011 Decision at 14.

⁴¹ March 2011 Decision at 13.

⁴² AECC Petition at 8. AECC seems to have limited its capital upgrade considerations to: routine rail maintenance; the replacement of defective ties where warranted; and ballast replacement as required for routine maintenance. AECC Opening Evidence and Argument, V.S. Heavin and Brookings at 9-11.

⁴³ The only costly improvement or upgrade that AECC conceded could be necessary was the construction or restoration of interchange track. E.g., id. at 8 (“In addition, prior to leasing the line to MNA, UP retired some sidings that are long enough for meets and passes of unit coal trains; these could be reestablished without grading or sub-grade work.... In the one portion of the railroad ... where the siding spacing may not be adequate, there are feasible options to extend one of the existing sidings by eight hundred feet, or to restore one of the sidings retired by UP”). Yet AECC’s concession was not accompanied by evidence regarding any specifics (e.g., costs or plans) for that interchange track construction or restoration.

⁴⁴ E.g., Entergy Opening Evidence and Argument, V.S. Crouch at 18-21 (arguing the feasibility of interchange points and estimating the “preliminary” costs for modifying the relevant interchange facilities as ranging between \$2.45 million and \$2.86 million); UP Reply Evidence and Argument, V.S. Hughes at 36-42 (arguing that Entergy had seriously underestimated the costs for interchange facilities and establishing its own estimates ranging between \$6.3 million and \$11.5 million); AECC Rebuttal Evidence and Argument, V.S. Nelson

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Board and AECC over the meaning and breadth of the phrase “significant capital upgrade” cannot support AECC’s claim of material error.

E. MNA Vulnerability to Adverse UP Action

AECC argues that the Board erred because the March 2011 Decision “leaves MNA vulnerable to adverse actions by UP to preclude MNA from competing with UP in the future.”⁴⁵ We note that MNA itself has not demonstrated concern about being vulnerable to future UP action and has not requested that any action be taken on its behalf. Just the opposite; MNA has argued that it “is not vulnerable to unfettered adverse actions by UP.”⁴⁶ AECC’s concerns regarding an opposing party do not support reconsideration.

Moreover, AECC’s arguments regarding the UP/MNA lease have no bearing on the suitability of this matter for reconsideration. AECC argued that changes to the UP/MNA lease/interchange commitment were needed to ensure the lease did not “destroy the effectiveness of the through route” and preclude UP from “prevent[ing] the through route prescribed by the Board from ever being effective.”⁴⁷ But AECC and Entergy failed to establish a carrier violation addressable by a through route prescription. Having failed to prove its need for a through route prescription, AECC necessarily failed to establish the need for relief meant to preserve the circumstances that could allow the Board to impose the denied prescription. The Board’s refusal to grant relief necessary to ensure the integrity of other relief to which AECC had no right is not material error.

F. Board Application of URCS

AECC has characterized as “flawed” the Board’s method of applying its general purpose costing model while comparing the different service routes.⁴⁸ AECC has instead proposed what it alleges is a more appropriate costing model methodology. Upon further examination, we have determined that the costing model methodology the Board used in its March 2011 Decision was indeed flawed. However, the Board’s error was not material as the costing numbers generated by more appropriate methodologies (including, for the purposes of this decision, the method preferred by AECC) still support the Board’s March 2011 Decision, as explained below.

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at 14-18 (exploring the options open to BNSF and MNA to control “the costs of upgrading the interchange” between the carriers without directly addressing the costs); AECC Rebuttal Evidence and Argument, V.S. Heavin and Brookings at 23-26 (“To perform an acceptable interchange of empty and loaded coal trains at Lamar or Aurora new interchange tracks must be constructed and we expressed this need in the original submission”). By most reasonable measures, a seven-figure capital investment would be considered “significant.”

⁴⁵ AECC Petition at 17.

⁴⁶ MNA Reply to AECC Petition for Reconsideration at 9.

⁴⁷ AECC Opening Evidence and Argument at 9.

⁴⁸ AECC Petition at 2.

During the prior proceedings, the parties disputed how best to calculate the variable costs of the UP/MNA and proposed BNSF/MNA routings. Our general purpose costing model, URCS, assumes that the assessed movements involve unit trains with head and back haul mileages that are the same. Routings considered by the Board typically conform to this assumption. However, the current UP/MNA route moves the loaded and empty cars via different routes with very different mileages. Thus the system-average assumptions in URCS do not reflect a key movement-specific feature of the current UP/MNA route caused by the defendants' decision to carry the heavily loaded coal trains along a longer route that avoids difficult terrain.

To take into account the significant difference in loaded and unloaded mileage, the Board treated the UP/MNA current and BNSF/MNA proposed routes as combined one-way movements, overcoming the URCS assumption that head hauls and back hauls are the same length. In other words, the Board broke the routings into component parts. The Board then used URCS to separately develop a variable cost estimate for the loaded movement and the unloaded movement. However, URCS does not permit the costing of a completely unloaded movement; there must be some tonnage associated with the movement or URCS will not generate a variable cost estimate. To overcome this hurdle, the Board added a single ton to the back haul weight, turning the unloaded legs into small loaded legs.⁴⁹

AECC challenges this approach. It alleges that the use of round trip mileage in URCS – a combination of one-way loaded movements from the PRB mines to the plant and unloaded movements from the plant to the PRB mines – was erroneous.⁵⁰ AECC argues that the loaded movement “is the principal source of gross ton miles ... and costs” and that the Board “ignored AECC’s evidence on this crucial point and relied instead on a flawed comparison of round-trip mileage.”⁵¹ AECC also argues that its observation of an alleged “wide disparity” in the combined head and back haul values (when compared with the routes’ head haul values) demonstrates the error of the Board’s mileage approach.⁵² AECC argues that the Board should have instead treated separate movements of loaded and empty cars as a single loaded movement and ignored the empty back haul.⁵³

Upon reconsideration, the Board believes that it was an error to allow these kinds of movement-specific adjustments to URCS in costing the current UP/MNA route and the proposed

⁴⁹ March 2011 Decision at 12 n.37 (citing Board workpapers), 13 (text and Table 1 describing analysis).

⁵⁰ The Board did use a conventional round-trip measure to analyze the “direct” UP/MNA routing option, since the loaded and unloaded mileage for that routing option were the same.

⁵¹ AECC Petition at 2.

⁵² Id. at 4.

⁵³ AECC Petition at 2 (quoting AECC Rebuttal Evidence and Argument, V.S. Nelson at 22-25).

BNSF/MNA route. In Major Issues in Rail Rate Cases,⁵⁴ the Board concluded that movement-specific adjustments to URCS undermine the reliability of the costing model. And in the March 2011 Decision, the Board properly held that just as such piecemeal adjustments to URCS are prohibited in rate cases, so too shall such adjustments to URCS be prohibited in §10705 cases.⁵⁵ The Board was incorrect, however, in stating that replacing the system-average figures in URCS with the actual number of loaded and empty mileages were adjustments “within the scope of the kinds of movement-specific operating characteristics of a movement (i.e., mileage of the movement) that we permit in rate reasonableness cases.”⁵⁶ In fact, this kind of movement-specific adjustment was contemplated and rejected in Major Issues.⁵⁷

Although we believe that the best approach to resolving this controversy would be using round-trip numbers generated by URCS, we will instead use the approach offered by AECC (i.e., focusing exclusively on the variable cost of the loaded portion of the movements) as the differences in relative variable costs between the two approaches are immaterial. Set forth below is our calculation, using 2009 URCS unit costs indexed to 2012 levels,⁵⁸ of the relative characteristics of the alternative routes.

⁵⁴ EP 657 (Sub. No. 1) (STB served Oct. 30, 2006) (Major Issues).

⁵⁵ March 2011 Decision at 13 n. 37.

⁵⁶ Id.

⁵⁷ Major Issues at 58. For the same reasons, we reject AECC’s argument that the Board should have performed a movement-specific adjustment to the URCS inputs on tare and gross weights because the URCS assumptions are overstated. AECC Petition at 3. As these are just more piecemeal, movement-specific adjustments, it was not material error for the Board to instead use the URCS inputs in developing the variable costs, and will continue to do so here. Moreover, we observe that AECC did not submit data on tare and gross car weights for the movements at issue.

⁵⁸ 2009 URCS costs have been indexed to a third quarter 2012 level. See STB Entergy 2009 URCS Variable Costs 3Q12 OW 101912.xls. Indexed 2009 numbers are being used rather than indexed 2010 numbers to preclude any potential need to later revisit this analysis in the event the Board were to require URCS changes arising from a forthcoming decision in Western Coal Traffic League—Pet. for Decl. Ord., FD 35506. Instead, in addition to adopting AECC’s suggested approach, 2009 URCS numbers more advantageous to AECC are also being applied in weighing its claims of material error. No inferences regarding the merits of either the Western Coal Traffic League proceedings or any related matters should be drawn from our use of the indexed 2009 figures.

Table 1
Characteristics of Alternative Routes
One-Way Loaded Direction

Mine Origin (Percent Used)		UP/MNA		BNSF/MNA
		Direct	Current	
North Antelope 76.0%	Distance (one-way)	1,165	1,314	1,231
	Variable Cost (per ton)	\$11.08	\$12.13	\$12.10
Cordero 13.2%	Distance (one-way)	1,201	1,349	1,237
	Variable Cost (per ton)	\$11.38	\$12.42	\$12.16
Caballo Rojo 7.90%	Distance (one-way)	1,205	1,354	1,233
	Variable Cost (per ton)	\$11.41	\$12.47	\$12.12

The relationship between the routes is very similar to the one demonstrated using the approach the Board initially adopted. The proposed route via BNSF/MNA for the coal bound for ISES has slightly lower variable costs than the current route. And again, both the current UP/MNA and proposed BNSF/MNA routes have higher variable costs than the direct UP/MNA route.

Weighing the totality of the evidence before us, we again find that the proposed BNSF/MNA route has not been shown to be a superior route to serve ISES. We again base this finding on a combination of factors.

First, the proposed BNSF/MNA route is only marginally shorter than the current UP/MNA route. Second, as shown above, the variable costs of transporting the coal over the current UP/MNA route and the proposed BNSF/MNA route continue to slightly favor the complainants' case, but remain very similar (the BNSF/MNA Route is 0.25% less costly from North Antelope, 2.09% less costly from Cordero, and 2.81% less costly from Caballo). Those very small differences are not sufficient to justify a prescription here when balanced with the third and fourth factors discussed below.

Third, UP and MNA could already route the traffic over the even shorter direct UP/MNA route, at a variable cost significantly below the variable cost of the proposed BNSF/MNA route. But doing so would require the shipments to traverse difficult terrain with heavy, loaded coal trains. By comparing the URCS variable costs of the direct UP/MNA route (\$11.08 per ton from North Antelope) against the variable costs of the current UP/MNA route (\$12.13 per ton from North Antelope), we can again estimate that the value of avoiding that terrain as being slightly less than \$7 million. Fourth, as discussed above, we find the evidence of record overwhelming that the terrain of the alternative BNSF/MNA route is clearly inferior to that of the current route. As the Board stated previously, “[s]ometimes the shortest route is the best route. But other times, it is best to avoid an obstacle rather than try to climb over it.”⁵⁹

⁵⁹ March 2011 Decision at 14.

In sum, AECC has failed to demonstrate the material error or new evidence that would justify reconsideration of the Board's March 2011 Decision. Accordingly, we will deny the AECC petition for reconsideration.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The motion to file a supplement to the petition for reconsideration is denied.
2. The petition for reconsideration is denied.
3. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman. Vice Chairman Mulvey commented with a separate expression.

VICE CHAIRMAN MULVEY, commenting:

This case has been before the Board, in one fashion or another, for more than 4 years. The Board has grappled with the impact of an interchange commitment with restrictive terms that was included in UP's lease of this line to MNA. The lease transaction was approved 20 years ago by the Board's predecessor, the Interstate Commerce Commission, at a time when the railroad industry was in a very different economic condition. The issue before the Board at this juncture is whether the Board erred in finding that the complainants failed to demonstrate that their proposed new route including a third-party carrier is superior to the existing UP/MNA route so as to warrant a through route prescription. On this issue, I agree that the evidence continues to support the Board's conclusion that the complainants failed to meet that burden. But I also believe that the difficult issues raised by cases involving long-standing interchange commitments highlight the need for the Board to carefully scrutinize transactions that include such contractual terms.